

HOW TO DETERMINE WHETHER AN ACTIVITY IS A SPORT UNDER FEDERAL LAW

Factors Outlined By the Office for Civil Rights in Making the Determination of Whether an Activity is a Sport for Title IX Purposes

General Title IX Provision:

Title IX implementing regulation at Title 34, section 106.41(a), of the Code of Federal Regulations, provides, in relevant part:

"[n]o person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient. ..."

Title IX Implementing Regulation

Title IX implementing regulation at Title 34, section 106.41(c), of the Code of Federal Regulations, provides:

"A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available, the Director will consider, among other factors:

- (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
- (2) The provision of equipment and supplies;
- (3) Scheduling of games and practice times;
- (4) Travel and per diem allowance:
- (5) Opportunity to receive coaching and academic tutoring;
- (6) Assignment and compensation of coaches and tutors:
- (7) Provision of locker rooms, practice and competitive facilities;
- (8) Provision of medical and training facilities and services;
- (9) Provision of housing and dining facilities and services;
- (10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for member of each sex."

Factors Used to Determine if an Activity is a Sport

The United States Department of Education, Office for Civil Rights (OCR) advises that in determining, on a case-by-case basis, whether an activity is a sport to be considered part of an athletic program within the meaning of the implementing regulation of Title IX of the Education Amendments of 1972, 34 C.F.R. § 106.41(c), the following five factors and other relevant information are analyzed:¹

- (1) Whether selection for the team is based upon objective factors related primarily to athletic ability;
- (2) Whether the activity is limited to a defined season;
- (3) Whether the team prepares for and engages in competition in the same way as other teams in the athletic program with respect to coaching, recruitment, budget, try-outs and eligibility, and length and number of practice sessions and competitive opportunities;²
- (4) Whether the activity is administered by the athletic department; and,
- (5) Whether the primary purpose of the activity is athletic competition and not the support or promotion of other athletes.

Other evidence relevant to the activity, which might demonstrate that it is part of an athletic program which may be considered includes, but is not necessarily limited to, the following: ³

- Whether organizations knowledgeable about the activity agree that it should be recognized as an athletic sport;
- Whether the activity is recognized as part of the interscholastic or intercollegiate athletic program by the athletic conference to which the institution belongs and by organized state and national interscholastic or intercollegiate athletic associations;
- Whether state, national, and conference championships exist for the activity;
- Whether a state, national, or conference rule book or manual has been adopted for the activity;
- Whether there is state, national, or conference regulation of competition officials along with standardized criteria upon which the competition may be judged; and,
- Whether participants in the activity are eligible to receive scholarships and athletic awards (e.g., varsity awards).

Further additional information to be considered in making the determination includes:⁴

The relationship of the activity to high school athletics departments and other sports;

¹ OCR Letter to Stead (April 11, 2000).

² Aside from the question as to whether an activity is considered a sport, in order for the athletes who engage in the activity to be considered participants for purposes of Title IX analysis of intercollegiate or interscholastic benefits and opportunities, they must be engaging in sports at the intercollegiate or interscholastic level of competition. Thus, club and intramural participants would be excluded from such a Title IX analysis.

³ Letter to Stead (April 11, 2000).

⁴ Letter to Anderson (March 18, 2004).

- Does the activity have the same or similar relationship to the high school athletic department as sports whose participants are currently counted for Title IX compliance purposes?
- What sets the activity apart from other activities in the state whose participants are generally not counted for Title IX compliance purposes?
- Does the District collect or maintain information that demonstrates that the activity is included within the Districts' athletics department budget for uniforms, equipment, supplies, and other support given by the District to its interscholastic athletic teams?
- Are the activity coaches selected and compensated in the same or similar manner as coaches of current sports?
- Are the coaches/judges certified in a comparable manner to current sports?
- Are participants in the activity eligible for varsity letters and similar awards available to athletes in the interscholastic athletic program?
- The team selection, preparation, and competition; and
 - Are non-athletic factors, such as leadership, appearance, and personality, considered in selecting students for the activity?
 - Do coaches of the District's current sports use non-athletic ability criteria for their team selection?
 - Are the non-athletic ability criteria the primary bases for team selection for any current sports?
 - Is the activity governed by a specific set of rules published by a state or national organization in the same or similar manner as current sports?
 - Does the activity prepare for and engage its participants in competition in the same way as other teams in the interscholastic athletic program?
 - How do the prescribed minimum number and average number of competitive opportunities for the activities season compare with those prescribed in other sports?
 - Is the practice schedule comparable to current sports?
- The relationship between competitive and stand-alone events.
 - Is the activity a stand-alone activity as the primary event without being scheduled simultaneously with another event?
 - Does the activity also engage in promotional or support activities, such as halftime shows or pep rallies?
 - Do members of the activity also perform other support functions at the competitive events of the District's sports teams during the activities competitive season?